MBf Finance Bhd v Lee Kim Hoi t/a Lee Kim Hoi

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–68 OF 1998
LOW HOP BING J
5 MAY 2004

Hire Purchase — Breach of agreement — Action to recover unpaid instalments — Defendant was in arrears of payments — Plaintiff sent defendant a letter of demand — Whether agreement terminated by plaintiff's letter

This was the plaintiff's claim against the defendant for RM312,188.87 as at 6 May 1998, with interest at 13.91% pa from 7 May 1998 until full realisation, and costs. The plaintiff and the defendant entered into a hire purchase agreement whereby the plaintiff agreed to let and the defendant agreed to hire one unit of Sumitomo SH 300 LC Hydraulic Excavator. By a letter dated 19 March 1998, the plaintiff demanded from the defendant arrears of instalment under the agreement. The plaintiff made some payments by cheque. The issue was whether the plaintiff by the letter of demand has terminated the hire purchase agreement. The defendant stated that the letter of demand had not validly terminated the agreement and the owner must have done some independent act indicating the hiring was terminated.

Held, giving judgment for the plaintiff:

(1) The plaintiff's amended statement of claim in para 4 referred to the letter of demand, in which para 4 contained a clause to the effect that the failure by the defendant to comply therewith would result in the plaintiff terminating the hire purchase agreement and claiming for the sum of RM378,346. That amount was, after deducting rebates and other expenses pleaded in para 5 of the plaintiff's amended statement of claim and after particularisation was reduced to RM312,188.87 (see para 17).

(2) The court was of the view that there was no merit in the submissions presented for the defendant. The answer to the above agreed issue for determination was obviously in the affirmative (see para 21).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif terhadap defendan untuk RM312,188.87 sehingga 6 Mei 1998 dengan faedah pada 13.91% setahun daripada 7 Mei 1998 sehingga selesai pembayaran dan kos. Plaintif dan defendan telah memasuki satu perjanjian sewa beli di mana plaintif dan defendan bersetuju menyewa satu unit Sumitomo SH 300 LC Hydraulic Excavator. Melalui surat yang bertarikh 19 Mac 1998, plaintif telah menuntut daripada defendan tunggakan ansuran di bawah perjanjian itu. Plaintif telah membuat beberapa bayaran melalui cek. Isunya adalah sama ada plaintif, melalui surat itu, telah menamatkan perjanjian sewa beli itu. Defendan berkata bahawa surat tuntutan itu tidak menamatkan perjanjian itu dengan sah dan pemunya mesti berbuat sesuatu yang bebas untuk menunjukkan bahawa perjanjian itu ditamatkan.

Diputuskan, memberi penghakiman kepada plaintif:

(1) Penyataan tuntutan terpinda plaintif di dalam perenggan 4 merujuk kepada surat tuntutan, yang mana di dalam perenggan 4 mengandungi klausa bahawa kegagalan defendan untuk mematuhi akan mengakibatkan penamatan perjanjian itu oleh plaintif dan plaintif akan menuntut jumlah RM378,346. Jumlah itu, setelah mengurangkan rebet dan perbelanjaan lain yang dituntut di dalam perenggan 5 penyataan tuntutan terpinda plaintif dan setelah diperincikan, telah dikurangkan kepada RM312,188.87 (lihat perenggan 17).

(2) Mahkamah berpandangan bahawa tiada merit di dalam hujahan yang dikemukan oleh defendan. Jawapan kepada persoalan untuk ditentukan adalah positif (lihat perenggan 21).].

Notes

For cases on actions to recover unpaid instalments, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3589–3590.

Cases referred to

Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860 (refd)
PN Pillay & Co Ltd v Kah Motor Co Ltd [1965] 1 MLJ 47 (refd)

Legislation referred to

Contracts Act 1950 ss 40, 76

Shamala Indran (Rohani Soon & Assoc) for the plaintiff.
Chiew Wei Meng (Chiew & Ho) for the defendant.

Low Hop Bing J:

Plaintiff's claim

[1] This is the plaintiff's claim against the defendant for RM312,188.87 as at 6 May 1998, with interest at 13.91% pa from 7 May 1998 until full realisation, and costs.

Agreed facts

[2] Parties have agreed to the following facts.

[3] The plaintiff and the defendant have entered into a hire purchase agreement dated 3 October 1996 ('the hire purchase agreement'), whereby the plaintiff agreed to let and the defendant agreed to hire one unit of Sumitomo SH 300 LC Hydraulic Excavator ('the goods').

[4] Vide the solicitor's letter of demand dated 19 March 1998, ('the letter of demand') the plaintiff demanded from the defendant arrears of instalment payment under the hire purchase agreement.

[5] Pursuant to the letter of demand, the defendant made payments by way of cheques drawn in favour of the plaintiff on 28 March 1998, 20 April 1998 and 25 April 1998, but payments on the cheques drawn on 28 March 1998 and 25 April 1998 could not be honoured.

Agreed issue for determination

[6] The sole issue agreed by the parties to be determined by this court is whether the plaintiff has vide the letter of demand validly terminated the hire purchase agreement.

Submission for parties and decision by court

[7] Ms Shamala Indran, learned counsel for the plaintiff, submitted that the defendant has no defence whatsoever, after having failed to honour two payments of the instalments, and that the hire purchase agreement has been validly terminated.

[8] It was contended by Mr Chiew Wei Meng, learned counsel for the defendant, that the letter of demand has not validly terminated the hire purchase agreement and that even if the defendant had refused to perform the agreement in its entirety by refusing to pay any further rental instalment, that would not have terminated the agreement, relying on the Court of Appeal decision in *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3MLJ 860.

[9] He added that the plaintiff as owner cannot repossess the goods until he has terminated the hiring and that there must be some independent act indicating that the hiring has been terminated eg by the issue of notice to the hirer. Support was sought in *PN Pillay & Co Ltd v Kah Motor Co Ltd* [1965] 1 MLJ 47.

[10] It was stressed for the defendant that the letter of demand remained a mere letter of demand and that only the cheque dated 28 March 1998 was not honoured, whereas the agreed facts revealed that two cheques were dishonoured.

[11] On my part, I have to contend with the very sketchy submissions of the respective learned counsel and then expend my own effort in an attempt to present a readable judgment.

[12] I shall now consider the authorities cited for the defendant.

[13] In *Leong Weng Choon,* by a hire purchase agreement, the plaintiff let to the first defendant a bus. The appellant guaranteed the payment of all sums of money due from or by the first defendant to the plaintiff. The first defendant defaulted in the payment of the monthly rentals. The bus had been seized and thereafter confiscated by customs officials. The plaintiff's statement of claim pleaded that the first defendant by defaulting on the payment of the monthly instalments had terminated the agreement. The plaintiff has obtained judgment against the appellant, ie the guarantor. The guarantor's appeal to the Court of Appeal was allowed.

[14] NH Chan JCA (as he then was) in delivering the judgment of the Court of Appeal held, inter alia, that even if the first defendant ie the hirer had repudiated by failing to perform the agreement in its entity and by refusing to pay any further rental instalments, as a matter of contract law, that would not have terminated the agreement. His Lordship added that it was only the plaintiff ie the owner who has the right to terminate the agreement, on the basis of s 40 of the Contracts Act 1950 which where relevant is reproduced as follows :

> When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its *continuance*.

[15] The learned judge of the Court of Appeal further held that only the plaintiff as owner could elect to treat the contract as at an end by accepting the repudiation and terminating the contract, and recover damages under s 76 of the Contracts Act 1950, or treat the agreement as alive and continuing. The plaintiff's pleadings must state the election, which however was not done by the plaintiff therein. As a matter of fact as well as on the pleadings, the Court of Appeal held that the plaintiff therein did not terminate the contract despite the repudiation by the first defendant so that the contract was still subsisting. Hence, on the cause of action as pleaded in the plaintiff's statement of claim, the plaintiff's claim as owner against the first defendant (hirer) was held to be unsustainable.

[16] The Court of Appeal also found that in the statement of claim there was no claim by the plaintiff to be indemnified by the appellant guarantor for the loss of the bus which, as alluded to above, has been confiscated by customs officials, as a result of which the Court of Appeal held that the action against the guarantor should have been dismissed. In other words, there were serious fundamental flaws in the pleadings of the plaintiff therein.

[17] Reverting now to the instant case, it is to be noted that the plaintiff's amended statement of claim did in para 4 thereof refer to the letter of demand, in which para 4 contained a clause to the effect that the failure by the defendant to comply therewith would result in the plaintiff terminating the hire purchase agreement and claiming for the sum of RM378,346. That amount was, after deducting rebates and other expenses pleaded in para 5 of the plaintiff's amended statement of claim and after particularisation, reduced to RM312,188.87. In the circumstances, the pleading herein is vastly different from that in *Leong Weng Choon* and so in my view the Court of Appeal judgment does not support the defendant's contention.

[18] On the contrary, the Court of Appeal judgment actually militates against the defendant's case. As alluded to above, para 4 of the letter of demand did expressly and specifically refer to the termination of the hire purchase agreement by the plaintiff owner, and such termination is in line with the dictum of NH Chan JCA (as he then was) in *Leong Weng Choon*.

[19] Another case cited for the defendant, ie *PN Pillary & Co*, concerns an action for damages for illegal seizure of a motor car which was the subject

matter of the hire purchase agreement therein. The plaintiff had not paid the first instalment and the defendant owner seized the car without giving any notice of termination of the hiring. Abdul Aziz J (later FJ) held that under the terms of the hire purchase agreement, the owner cannot repossess the car until he has terminated the hiring. As there was no evidence that the defendant had terminated the hiring before seizure in that case, the seizure was held to be unlawful.

[20] In the instant case, there was no repossession of the goods by the plaintiff. A statement from the Bar table by the plaintiff's counsel revealed that the goods had been in the defendant's possession from the date of the agreement, and that it is now missing. In the light of the substantially different facts in *PN Pillay & Co*, it is difficult to see how the judgment in that case can lend any assistance to the defendant's case.

[21] In the ultimate analysis, I am of the view that there is no merit in the submissions presented for the defendant. The answer to the above agreed issue for determination is obviously in the affirmative. I therefore give judgment for the plaintiff in terms of the plaintiff's claim as set out above.

Judgment for the plaintiff given.

Reported by Chew Phye Ken